STATE OF MICHIGAN

COURT OF APPEALS

WEST MICHIGAN FILM, LLC, Plaintiff-Appellant,	UNPUBLISHED April 22, 2014
v	No. 313243 Court of Claims 12-000026-MK
MICHIGAN FILM OFFICE and THE STATE OF MICHIGAN Defendant-Appellee.	

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals by right from an order of the Court of Claims granting defendant's motion for summary disposition under MCR 2.116(C)(4) (subject matter jurisdiction) and (C)(8) (failure to state a claim). We affirm.

I. FACTS

In April 2008, the Michigan Legislature enacted section 457 of the Michigan Business Tax Act, MCL 208.1101 *et seq.*, in order to incentivize investment in the state's film industry. MCL 208.1457. Under the statute, taxpayers may enter into an agreement with the Michigan Film Office (MFO) to receive a credit against their Michigan Business Tax liability for up to 25 percent of a qualifying investment in digital media infrastructure. MCL 208.1457(1) and (2). In order to receive the tax credit, a taxpayer must: (1) "invest and expend at least $250,000.00 for a qualified film and digital media infrastructure project in this state"; (2) enter into an agreement with the MFO; (3) receive an Investment Expenditure Certificate (IEC) from the MFO; (4) submit the IEC to the Department of Treasury; and (6) the taxpayer must not "be delinquent in a tax or other obligation owed" to the state. MCL 208.1457(1)(a) through MCL 208.1457(1)(e).

A taxpayer cannot qualify for the tax credit without first entering into an approved application and agreement with the MFO. Only then may a taxpayer "request" an IEC from the MFO. MCL 208.1457(5). If the MFO determines that the taxpayer has in fact "complied with the terms of" the agreement, it must issue that IEC. MCL 208.1457(5). At that point, the taxpayer may submit its IEC to the Department of Treasury to claim the credit. MCL 208.1457(5) and (7).

Plaintiff is a limited liability company organized in 2009 for the purpose of developing a film production studio at a facility previously owned by Lear Corporation. Plaintiff intended to purchase the facility for $40 million from Alpinist Endeavors, LLC under a seller-financed land contract. In order to complete the transaction, plaintiff needed to sell the subject $10 million tax credit to a third-party purchaser prior to closing.

Throughout early 2009, plaintiff worked with Janet Lockwood, director of defendant MFO, and Penny Launstein, a representative of the Department of Treasury, on developing an application and agreement for the project. On September 22, 2009, plaintiff submitted a draft application and agreement with an attached business plan. In an email response, Launstein commented on plaintiff's reported financing: "[Y]ou mention that you have financing in place. We will want to see your bank letter or whatever proof you can share." In addition, Launstein suggested that plaintiff remove a mention of " 'the infrastructure credit' . . . as it sounds like it has already been committed."

On November 2, 2009, plaintiff submitted a finalized application and agreement to the MFO under MCL 208.1457(5), along with its business plan. The agreement itself consists of a standard application form issued by the MFO that reflects the statutory framework, stating: "Approved applicants will be notified by the [MFO]. Once the project has met the requirements of the agreement, the applicant can request an [IEC] from the [MFO]." In its attached business plan, plaintiff states that the majority of the project will be financed through a "Conventional Mortgage Loan,"[1] assuming that the remainder would be financed with the $10 million tax credit.

On November 25, 2009, the MFO and the Department of Treasury approved plaintiff's submitted application and agreement. However, Lockwood and Launstein questioned whether plaintiff's application qualified for an IEC under the statute. Thereafter, Lockwood requested specified documentation. Apparently Lockwood was not getting what she needed from plaintiff. She explained to plaintiff that the MFO "especially must see that you have purchased the property."

Plaintiff executed a $40 million land contract for the facility on April 5, 2010, paying just over $2 million up front. On May 21, 2010, plaintiff formally submitted an unsigned IEC to the MFO. That same day, Lockwood formally denied plaintiff's request:

> After careful review of your submitted Film Infrastructure Investment Expenditure Certificate, and what related information you did provide, as well as consideration of the requisite statutory factors, we regret to inform you that **a Michigan Business Tax credit for the above captioned project has been denied**.
>
> **The denial** is based on the following:

[1] Despite language in the actual application and agreement, both parties acknowledge that plaintiff intended to use seller financing to purchase the facility.

> Lack of appropriate documentation as requested by the Michigan Film Office. Section 457.(5) of 2007 PA 36, reads . . . *The taxpayer shall submit a request to the [film] office for an investment expenditure certificate on a form prescribed by the office, along with any information or independent certification the office or the department [Department of Treasury] deems necessary . . . the film office may request additional information or independent certification before issuing an investment expenditure certificate and need not issue the investment expenditure certificate until satisfied that investment expenditures and eligibility are adequately established. The additional information request may include a report of expenditures audited and certified by an independent certified public accountant.*
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> The office did request considerable additional information, as the law allows, but did not receive what was requested.
>
> Please note that because you did not properly sign or fully date the IEC submitted March 2, 2010, we have attached as Exhibits 1 and 2 your cover email of that date and the letter from your CPA. We have also added a short note on the last page of the IEC. We encourage continued support of Michigan's film and television industry. [Italicized emphasis original; bold emphasis added.]

On March 7, 2012, plaintiff filed a verified complaint in the Court of Claims, seeking damages for breach of contract and violations of MCL 208.1457. In response, defendant moved for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim) and MCR 2.116(C)(4) (lack of subject matter jurisdiction). Ultimately, the Court of Claims granted defendant's motion, finding that because no contract existed between the parties, plaintiff had failed to state a claim for breach of contract. Further, because plaintiff's only method of challenging the denial of its IEC is through an appeal to the circuit court under MCL 600.631 and MCR 7.123, the Court of Claims concluded that it lacked subject matter jurisdiction. Because the Court of Claims found that it lacked jurisdiction, it decided it did not have to address defendant's assertion that plaintiff failed to file its claim within one year of accrual as required by MCL 600.6431.

II. ANALYSIS

Plaintiff argues that it has an enforceable contract with the MFO, and therefore, the Court of Claims should not have dismissed its claim for lack of subject matter jurisdiction. Under MCR 2.116(C)(4), the Court of Claims may dismiss a plaintiff's claim for lack of subject matter jurisdiction. *Cairns v City of East Lansing*, 275 Mich App 102, 107; 738 NW2d 246 (2007). "Jurisdictional questions under MCR 2.116(C)(4) are questions of law that are also reviewed de novo." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). In *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 407; 809 NW2d 669 (2011), we explained the review given to a decision under MCR 2.116(C)(4):

> This Court considers the pleadings and any affidavits or other documentary evidence submitted by the parties to determine if there is a genuine issue of material fact when reviewing a motion under MCR 2.116(C)(4). Jurisdictional

> questions are reviewed de novo, but "this Court must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate . . . [a lack of] subject matter jurisdiction." [Quotation marks and citations omitted.]

We hold that the trial court properly dismissed the complaint on jurisdictional grounds, though we decide it under the terms of MCL 600.6431.[2]

Under MCL 600.6431, "[n]o claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim . . . ." "Therefore, the failure to file a compliant claim or notice of intent to file a claim against the state within the relevant time periods designated in either subsection (1) or (3) will trigger the statute's prohibition that '[n]o claim may be maintained against the state . . . .' " *McCahan v Brennan*, 492 Mich 730, 742; 811 NW2d 747 (2012).

A breach of contract "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. Here, defendant sent a letter to plaintiff denying plaintiff's request for an IEC on May 21, 2010. Plaintiff did not file its claim against the state until March 7, 2012, long after the statute's one-year filing limitation.

Seeking to avoid this statutory requirement, plaintiff argues that its claim did not accrue on May 21, 2010 because defendant's denial letter did not constitute a clear and unequivocal repudiation of the contract. However, assuming the existence of a contract between the parties, defendant's May 21, 2010 letter unequivocally informed plaintiff that defendant would not be performing. Again, the letter provides:

> After careful review of your submitted Film Infrastructure Investment Expenditure Certificate, and what related information you did provide, as well as consideration of the requisite statutory factors, we regret to inform you that **a Michigan Business Tax credit for the above captioned project has been denied**.
>
> **The denial** is based on the following:

[2] Generally, an issue is properly preserved for appeal if it is raised in, addressed, and decided by, the trial court. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84, 91 (2005). Here, although the trial court chose not to address the issue, because both parties raised the issue in their briefs for and against summary disposition, and again on appeal, we consider this legal issue preserved. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

> Lack of appropriate documentation as requested by the Michigan Film Office. Section 457.(5) of 2007 PA 36, reads . . . *The taxpayer shall submit a request to the [film] office for an investment expenditure certificate on a form prescribed by the office, along with any information or independent certification the office or the department [Department of Treasury] deems necessary . . . the film office may request additional information or independent certification before issuing an investment expenditure certificate and need not issue the investment expenditure certificate until satisfied that investment expenditures and eligibility are adequately established. The additional information request may include a report of expenditures audited and certified by an independent certified public accountant.*
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The document clearly indicates that plaintiff's request for the IEC was denied on May 21, 2010. Additionally, in plaintiff's verified complaint, plaintiff asserts that "on May 21, 2010 the MFO, through Lockwood, officially denied Plaintiff's application for the IEC." Because plaintiff's breach of contract claim accrued on the date of the breach, *Dewey v Tabor*, 226 Mich App 189, 193; 572 NW2d 715 (1997), the one year period began on May 21, 2010. And, it is undisputed that plaintiff did not file a notice or claim until March 2012, more than a year later. Because plaintiff did not comply with the clear and unequivocal demands of MCL 600.6431(1), the trial court lacked jurisdiction to hear the claim. *McCahan*, 492 Mich at 742.[3]

Even if these claims were not barred by virtue of MCL 600.6431(1), we would hold that plaintiff and the MFO did not enter into a legally enforceable contract, and thus, there was no jurisdiction for this claim in the Court of Claims. MCL 600.6419(1)(a). First, the actual document plaintiff submitted to the MFO does not itself meet the essential elements of a binding contract. To form a binding contract, there must be legal consideration, mutuality of agreement, and mutuality of obligation. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012). Here, as determined by the Court of Claims, there is no mutuality of obligation between plaintiff and the MFO. While the application directs plaintiff to fulfill several obligations, it does not require the MFO to do anything. Rather, it simply states: "Once the project has met the requirements of the agreement, the applicant can request an [IEC] from

[3] What the MFO's true intentions were behind the denial letter, and whether the reasons set forth in that letter were accurate, are irrelevant to determining when the claim accrued. What is relevant is that plaintiff thought it had a contract with the MFO, and on May 21, 2010, the MFO clearly expressed its intent not to comply with whatever contract plaintiff thought it had.

the [MFO]." The application does not contain any language requiring the MFO to issue an IEC. Additionally, it is the Treasury Department, not the MFO, that would have any obligation to issue the credit.

Because the application and agreement alone does not constitute a binding contract, any obligation the MFO has to issue plaintiff an IEC must come from the statute itself. However, there exists a "strong presumption that statutes do not create contractual rights." *Studier v Michigan Pub School Employees' Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005). In order for MCL 208.1457 to form the basis of a contract between plaintiff and the MFO, "the statutory language must be plain and susceptible of no other reasonable construction than that the Legislature intended to be bound to a contract." *Id.* at 662 (quotation marks and citation omitted). Specifically, the statutory language must provide "for the execution of a written contract on behalf of the state." *Id.* (quotation marks and citation omitted; emphasis omitted).

Plaintiff argues that MCL 208.1457 satisfies this requirement because it allows the MFO to enter into an "agreement" with a taxpayer. However, nothing in the statute expressly indicates that an application and agreement alone confers a contractual right or benefit upon an applicant. Rather, entering into an application and agreement is just one of several requirements a taxpayer must meet under the statute in order to receive the tax credit.[4] MCL 208.1457(1)(a) through MCL 208.1457(1)(e) and MCL 208.1457(5).

Because neither the application and agreement, nor the statute, form the basis of a contract between plaintiff and the MFO, plaintiff did not state a claim for breach of contract. Therefore, the Court of Claims correctly dismissed plaintiff's breach of contract claim for lack of subject matter jurisdiction.

Affirmed.

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ Michael J. Riordan

[4] We also note that the statute under which plaintiff asserts relief has been repealed, placing into serious doubt plaintiff's ability to obtain relief if it were able to prevail on its claims. See MCL 208.1107(1)(d).